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Trial Practice - Judge and Jury - Absence of Counsel

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difficulty separating testimony from advocacy, and (2) trial counsel would not be placed in the awkward position of arguing his own credibility. Thus, two of the reasons for refusing to permit an attorney-witness to act as trial counsel do not apply to the situation where trial counsel is a partner of the attorney-witness. There still remains the argument that the partner-witness has an interest in the outcome of the case and thus might be tempted or pressured to mold his testimony into a form most favorable to the client of his firm. However, this interest argument can be made of many witnesses, yet their testimony is permitted, subject to attack as to credibility. It is submitted that the argument of interest, standing alone, should not justify the exclusion of an attorney as trial counsel in a case wherein his partner will appear as a material witness. It is doubtful that the image of the profession will be damaged in such cases.

The present Canons of Ethics have undergone considerable criticism in recent years and a special committee has been created by the American Bar Association to re-evaluate and possibly revise the Canons.[36] At this time it cannot be determined whether the special committee has decided to alter Canon 19 or to reconsider the position taken in Opinion No. 220. It is submitted that the present position is the correct one. However, in view of the *Wieherer* dicta, the committee should consider the problem again and restate Canon 19 in accordance with its decision.

John Ralph Kenrick

TRIAL PRACTICE—Judge and Jury—Absence of Counsel—In a recent series of decisions the Pennsylvania Supreme Court has ruled that any communication by the judge with the jury other than in open court and in the presence of counsel for all parties requires reversal notwithstanding the absence of prejudice.

Gould v. Argiro, 422 Pa. 433, 220 A.2d 654 (1966). *Kersey Mfg. Co. v. Rozic*, 422 Pa. 564, 222 A.2d 713 (1966). *Yarsunas v. Boros*, 423 Pa. 364, 223 A.2d 696 (1966).

During its deliberations in *Gould v. Argiro*,[1] the jury sent two requests for further instructions to the trial judge who informed them by return note to only utilize the testimony given by the witnesses in the case. Neither

36. Powell, *The President's Page*, 50 A.B.A.J. 1005 (1964). For a general discussion of the problems which may be considered by the special committee see Swindler, *Toward a Restatement of Professional Ethics*, 27 U. PITT. L. REV. 795 (1966), and Cheatham, Sutton, Sears, Armstrong, Watson, Johnstone, Elson, Thode, and Weckstein, *Re-evaluation of the Canons of Professional Ethics: A Symposium*, 33 TENN. L. REV. 129 (1966).

1. Gould v. Argiro, 422 Pa. 433, 220 A.2d 654 (1966). Argued on May 25, 1966; decided on June 24, 1966.

counsel was present for this exchange nor was any effort made to contact them. The jury request and the judge's reply were not made a part of the record. Appellees argued that the jury verdict should not be vacated without a showing of prejudice. On appeal, the supreme court reversed; *held*, any instruction by the trial judge to the jury in the absence of counsel requires a new trial notwithstanding the absence of prejudice.

Mr. Justice Cohen, speaking for the majority of the court, pointed out that the potential impediment to a fair proceeding inherent in these practices necessitated a new trial, that the showing-of-prejudice rule has been undermined by the more recent case of *Glendenning v. Sprowls*[2] and that additionally, any instruction of which there is no record is always objectionable.

The jury in *Kersey Mfg. Co. v. Rozic*[3] also sent a note to the trial judge asking, in effect for additional advice. The judge was away from the courtroom at the time. When he was informed of the note by the court crier, the judge instructed him by phone to send a note back to the jury advising them to continue deliberating and to come to a decision to the best of their judgment. Again, neither attorney knew of the jury's note nor of the judge's response until after the verdict was returned for defendant; in addition, it was not until five months later that the note was made a part of the record. The superior court held that the showing-of-prejudice rule did not apply to innocuous jury communications, such as existed in the case at hand.[4] The supreme court reversed and remanded; *held*, that *any* communication between a judge and jury, including harmless messages, other than in open court and counsels' presence requires reversal *per se*.

Mr. Justice Jones arrived at this conclusion by tracing the case law in the area, relying to a great extent on the language in *Gould v. Argiro*.[5] His opinion, however, criticized the showing-of-prejudice rule more directly than *Argiro* by stating that since there was simply no way of determining the influence of such communications on the jury, the safest course would be to avoid all questions by requiring all jury deliberations to be conducted in the utmost privacy. Justice Jones also specifically held that the *per se* rule applies to both instructions and communications, thereby abolishing in Pennsylvania a distinction that many other State courts assiduously make.

2. 405 Pa. 222, 226, 174 A.2d 865, 867 (1961). "We strongly condemn any intrusion by a Judge into a jury room during the jury's deliberations, or any communication by a Judge with the jury without prior notice to counsel, and such practice must be immediately stopped!" Note the firmness of the mandate.

3. Kersey Mfg. Co. v. Rozic, 422 Pa. 564, 222 A.2d 713 (1966). Argued on April 19, 1966; decided on September 27, 1966.

4. Kersey Mfg. Co. v. Rozic, 207 Pa. Super. 182, 215 A.2d 323 (1965) (two judges dissenting).

5. 422 Pa. 433, 220 A.2d 654 (1966).

In the third case, *Yarsunas v. Boros*,[6] the jury also sent a note to the trial judge inquiring about a possible connection between the attorneys and an insurance company. The trial judge replied by note that the jury was to only consider the matters on which they were charged. Neither attorney was present at the time; in this case, however, the note was properly made a part of the record. The plaintiff moved for a new trial on the strength of *Gould v. Argiro*,[7] which had been recently decided. Defendant appealed from the granting of the motion but the supreme court affirmed; *held*, *Gould v. Argiro*[8] and *Kersey Mfg. Co.*[9] are reaffirmed and followed.

While recognizing that these two decisions controlled, Mr. Justice Eagen further analyzed the majority's reason for disapproving the showing-of-prejudice rule:

> Such a rule would surely lead to confusion and inconsistent results. Further, past experience dictates that guidelines for trial judges, in this respect, be fixed and clear in order that all possible prejudice to litigant's causes be completely eliminated.[10]

In each of these decisions, the supreme court was divided. Mr. Chief Justice Bell and Mr. Justice Musmanno dissented in *Gould v. Argiro*.[11] However, in *Kersey Mfg. Co. v. Rozic*,[12] only Mr. Chief Justice Bell dissented with Mr. Justice Roberts filing a concurring opinion. In the final decision,[13] the minority members of the court appeared together for the first time with dissenting opinions by Mr. Chief Justice Bell and Justices Roberts and Musmanno.

The Chief Justice's opinion is that the showing-of-prejudice rule should only be applied to an instruction to the jury "as that term has always been used and understood."[14] Mr. Justice Musmanno's position is that the majority's concern for a *per se* rule in the area is "Much Ado About Nothing."[15] Mr. Justice Roberts' position has evolved from the majority

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6. Yarsunas v. Boros, 423 Pa. 364, 223 A.2d 696 (1966). Argued on October 3, 1966; decided on November 15, 1966.

7. 422 Pa. 433, 220 A.2d 654 (1966).

8. *Ibid.*

9. 422 Pa. 564, 222 A.2d 713 (1966).

10. 423 Pa. 364, 367, 223 A.2d 696, 697 (1966).

11. 422 Pa. 433, 220 A.2d 654 (1966).

12. 422 Pa. 564, 222 A.2d 713 (1966).

13. 423 Pa. 364, 223 A.2d 696 (1966).

14. *Id.* at 367, 223 A.2d at 698. It is noteworthy that Mr. Chief Justice Bell authored the majority opinion in Glendenning v. Sprowls, 405 Pa. 222, 174 A.2d 865 (1961), upon which the current majority relies as past support for its rule.

15. Gould v. Argiro, 422 Pa. 433, 437, 220 A.2d 654, 656 (1966).

in *Argiro*[16] to the minority in *Yarsunas;*[17] in *Kersey*,[18] he concurred because of the presence of prejudice but vigorously objected to the majority's prophylactic rule since he saw no justification for a rule that would only create "much mischief" in the lower courts.

This division within the Pennsylvania Supreme Court reflects the division between State courts as a whole, particularly in the area of additional instructions.[19] One State court in concluding that the showing-of-prejudice rule was the better one undertook to collect and examine the various views in the United States and stated:

> Only a few jurisdictions remain that follow the strict rule that any communication is error whether prejudicial or not and that such error is cause for reversal. The majority of modern decisions follow the trend of liberalizing the rule to the extent that, if error is not prejudicial, then a new trial ought not to be granted or a judgment reversed.[20]

It is noteworthy that some States have statutes which require reversal only if a defect which prejudices the substantial rights of the defendant exists.[21] Pennsylvania has no such statute; however, even if one existed, it is submitted that no different result would be reached in the instant cases for jury communications in the absence of counsel could be easily interpreted as affecting the substantial rights of a party.

The latter reason is the principal one advanced by the Federal system in adhering to the *per se* rule.[22] Recently, the United States Supreme Court had occasion to suggest its rationale in the broad area of jury communications in a decision wherein a bailiff made statements about a defendant

16. *Id.* at 433, 220 A.2d at 654.

17. 423 Pa. 364, 223 A.2d 696 (1966).

18. 422 Pa. 564, 222 A.2d 713 (1966).

19. 89 C.J.S. *Trial* § 478 (1955); Annot. 41 A.L.R.2d 227, 288 (1955); Annot. 84 A.L.R. 211 (1933).

20. State v. Schifsky, 243 Minn. 533, 69 N.W.2d 89 (1955). The Court noted that prior to 1881, Minnesota followed the *per se* rule but in that year decided that the showing-of-prejudice rule ". . . is the better and more practical rule. . . ." Oswald v. Minneapolis & N.W. Ry. Co., 29 Minn. 5, 11 N.W. 112 (1881).

Curiously, the Minnesota Court cited Pennsylvania as following the showing-of-prejudice rule. See note 25, *infra*.

21. Massachusetts, for example, has the following Statute:

> No new trial shall be granted in any civil action or proceeding . . . for any error as to any matter of pleading or procedure, if the judge who presided at the trial when application is made by motion for a new trial, or the supreme judicial court . . . deems that the error complained of has not injuriously affected the substantial rights of the parties.

MASS. GEN. LAWS ch. 231, § 132 (1959). See, *e.g.*, Runshaw v. Berstein, 347 Mass. 405, 198 N.E.2d 293 (1964).

22. Fillippon v. Albion Vein Slate Co., 250 U.S. 76 (1919); Arrington v. Robertson, 114 F.2d 821 (3rd Cir. 1940).

within the hearing of a State court jury.[23] In a Per Curiam decision it ruled that "the unauthorized conduct of the bailiff involves such a probability that prejudice will result that it is deemed lacking in due process."[24] This interpretation of the due process clause seems to be a more adequate reason for a prophylactic rule, although it was not utilized by Justices Cohen, Jones and Eagen in support of their position.

As indicated earlier, great reliance was placed in the majority's opinions on past case law in Pennsylvania. What is unusual is that the past decisions are conflicting.[25] The method by which the majority chose to show their disapproval with these conflicting cases was to explain the inherent difficulty with the one major opinion supporting the showing-of-prejudice rule, *i.e.*, Mr. Justice Horace Stern's opinion in *Sebastianelli v. Prudential Ins. Co. of America.*[26] Their unwillingness, however, to specifically overrule the *Sebastianelli*[27] decision allowed Mr. Justice Musmanno to make a major argument in his *Argiro*[28] dissent that no case cited by the majority and least of all *Glendenning v. Sprowls*,[29] with its many factual differences, is precedent for a *per se* rule. In spite of these differences, however, *Glendenning* does contain dictum supporting such a rule.[30] Thus, it is suggested that, if any criticism of the rule is to be valid, an approach different than finding fault with the case law should be utilized.

The general reaction to the rule developed by the three instant cases will most likely be similar to Mr. Justice Roberts' objection that the decision "constitutes an unnecessary reproach to the trial judge, creates an undue hardship on the appellant and is an unneeded addition to the trial courts' ever increasing backlog."[31] These considerations do have

23. Parker v. Gladder, 87 Sup. Ct. 468 (1966).

24. *Ibid.* Justice Harlan dissented in what he described as the case of an "apparently Elizabethan-tongued bailiff" because he feared the opinion now leaves open the possibility of automatically requiring a mistrial on constitutional grounds whenever any juror is espoused to any potentially prejudicial expression of opinion.

25. *Accord*, Glendenning v. Sprowls, 405 Pa. 222, 174 A.2d 865 (1961); Hunsicker v. Waidelich, 302 Pa. 224, 153 Atl. 335 (1931); Somer v. Huber, 183 Pa. 162, 38 Atl. 595 (1897). *Contra*, Krywricki v. Trommer, 199 Pa. Super. 145, 184 A.2d 389 (1962), *allocatur refused*, 199 Pa. Super. xxx; Sapsara v. Peoples Cab Co. 381 Pa. 241, 113 A.2d 278 (1955); Sebastianelli v. Prudential Ins. Co. of America, 337 Pa. 466, 12 A.2d 113 (1940); Altsman v. Kelly, 336 Pa. 481, 9 A.2d 423 (1939); Allegro v. Rural Valley Mutual Fire Ins. Co., 266 Pa. 333, 112 Atl. 140 (1920); Cunningham v. Patton, 6 Pa. 355 (1847).

See also LAUB, PENNSYLVANIA TRIAL GUIDE § 157.2 and § 157.3; 6 STANDARD PENNSYLVANIA PRACTICE Ch. 24, § 78 and Ch. 26, § 81.

26. 337 Pa. 466, 12 A.2d 113 (1940).

27. *Ibid.*

28. 422 Pa. 433, 220 A.2d 654 (1966).

29. 405 Pa. 222, 174 A.2d 865 (1961).

30. *Id.* at 224, 174 A.2d at 867, "This Court has, on prior occasions, warned trial Judges that they are not to enter the jury room or *privately communicate with the jury under any circumstances*. . . ." [Emphasis added.]

31. Yarsunas v. Boros, 423 Pa. 364, 368, 223 A.2d 696, 698 (1966).

merit but it is submitted that any inconvenience resulting from the rule should only be minor. The recently published *University of Chicago Jury Study* suggests this conclusion by disclosing that the number of occasions on which juries request additional instructions is infrequent.[32] In fact, the *Study* gives additional support to the majority's *per se* rule by pointing out that when juries do make such additional requests, they are most often concerned with the Law they are to apply.[33] It would seem, therefore, that even if a *per se* rule were not set forth in a jurisdiction, it would still be very advantageous for counsel to be present during jury deliberations to insure that the jury is always correctly charged.

A logical question left unanswered by the three recent supreme court opinions is whether *per se* rules should be adopted in other trial practice areas where the showing-of-prejudice rule now prevails. Certainly, it can be forcefully argued that there is simply no reliable way of determining the existence of prejudice in any situation and that the safest course is to follow a *per se* rule. Criminal cases which concern fundamental rights of individuals would seem to more susceptible to this type of argument than civil cases.[34] Ironically, however, the showing-of-prejudice rule seems to have prevailed in past Pennsylvania criminal cases and Mr. Justice Roberts points out that there is at least one area of criminal law where there is a far greater danger of the evils the majority desire to avoid but the rule is far less stringent.[35] In view of this, therefore, it is suggested that it is unlikely that the *per se* rule will automatically be introduced into other areas of the law.

Final consideration should be given to the alternatives now available to a trial judge in insuring that counsel will be present during all jury deliberations. The most obvious would be to impose the absolute rule that attorneys must hold themselves available to the court at all times. The supreme court has stated approval of this rule in *Gould v. Argiro*.[36] It involves many practical problems, however, as the fact situations in the instant cases indicate: a jury may deliberate for many hours and

32. KALVEN AND ZEISEL, THE AMERICAN JURY 510 (1966). "On the average, it has a question in about 1 out of every 6 deliberations. And even if the case is 'difficult,' it comes back in only about 1 out of every 3 or 4 cases."

33. *Id.* at 511. "More than half of all requests concern questions on the law. . . . Another third of the requests concern questions of evidence."

The authors ask the "intriguing" question of whether the handling of the jury's request has any traceable effect on its verdicts but concluded that no inference could be drawn on this point since there were so few cases in which the judge refused to answer the jury's question. The data indicates, however, that the chances of a hung jury are about three times as great in cases where the jury comes back.

34. Commonwealth v. Kelly, 292 Pa. 418, 141 Atl. 246 (1928); Commonwealth *ex rel.* Comer v. Maroney, 178 Pa. Super. 633, 116 A.2d 301 (1955).

35. Commonwealth *ex rel.* Smith v. Rundle, 423 Pa. 93, 223 A.2d 88 (1966).

36. 422 Pa. 433, 220 A.2d 654 (1966).

make a request at any time of the day or evening, thereby making an attorney's day-to-day schedule less flexible for other legal matters.[37]

An alternative method of solving the problem would be to allow counsel to waive his right to be present for any judge and jury communications. Support for this view does exist in the Federal system.[38] However, it is not problem-free, in itself, for it has been stated that waivers in this area must be strictly construed[39] and, of course, there may be possible due process problems if a criminal defendant's counsel has waived the requirement of his presence for jury communications and the latter objects or the communication is crucial in the outcome of the trial. For the present, however, these two methods, regardless of their practical problems, seem to be the only alternatives available to trial judges to insure compliance with the *per se* rule.

Overall, then, it appears that the present majority of the Pennsylvania Supreme Court considers the value of an impartial jury to be far greater than any possible inconvenience to a trial court's docket, a lawyer's schedule or even the swift disposal of a lawsuit.[40] The opinions in the instant decisions indicate that while some changes must necessarily occur in trial practice, the *per se* rule for all jury communications is still the better to follow. Other jurisdictions would do well to adopt a similar rule.

Joseph A. Murphy

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37. In *Yarsunas* the jury retired to deliberate at 10:25 A.M. At 12:45 P.M., their note was sent to the judge who answered it within ten minutes.

The jury note in *Kersey* was delivered at the time of the evening meal after the jury had deliberated for more than two hours.

38. Arrington v. Robertson, 114 F.2d 821 (3rd Cir. 1940); Railway Express Agency, Inc. v. Little, 50 F.2d 59 (3rd Cir. 1931).

39. Arrington v. Robertson, 114 F.2d 821 (3rd Cir. 1940).

40. "It has been wisely stated that 'Next to the tribunal being in fact impartial is the importance of its appearing so.'" Shorger v. Basil, Dighton, Ltd., [1924] 1 K.B. 274, 278. "This applies in a special way to the judge and his relationship with the jury." Mr. Chief Justice Bell in Glendenning v. Sprowls, 405 Pa. 222, 224, 174 A.2d 865, 866 (1961).